(8)

No. 03-7434

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In The
Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. *MEZEI* IMPROPERLY APPLIED THE ENTRY FICTION TO HOLD THAT AN ALIEN WITH SIGNIFICANT CONTACTS IN THE UNITED STATES POSSESSED NO DUE PROCESS RIGHTS 5

A. The *Mezei* Decision 5

B. The *Mezei* Decision Was Severely Criticized 7

II. *MEZEI'S* APPLICATION OF THE ENTRY FICTION HAS CREATED AN INTOLERABLE INCOHERENCE IN THIS COURT'S DUE PROCESS JURISPRUDENCE 10

A. *Mezei* Ignored Prior Jurisprudence Recognizing Due Process Protections for Aliens at the Border 11

B. The *Mezei* Holding That Aliens at the Threshold of Entry Are Unprotected by Due Process Has Been Further Undermined by the Subsequent Decisions of this Court 15

i. Due Process Developments 16

ii. Understandings of the Constitution's Territorial Scope have Expanded Since *Mezei* 19

TABLE OF CONTENTS – Continued

Page

iii. This Court has Cabined the Plenary Power Doctrine Since *Mezei* 20

C. Application of the Entry Fiction to Parolees Present in the United States with Substantial Connections to the Community Creates an Intolerable Constitutional Incoherence 22

III. THE COURT SHOULD REMEDY THE CONSTITUTIONAL INCOHERENCE CREATED BY *MEZEI* AND SUBJECT IMMIGRATION DETENTION DECISIONS TO ORDINARY *MATHEWS V. ELDRIDGE* SCRUTINY..... 25

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES:

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987)..... 20

Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) 23

Chae Chan Ping v. United States, 130 U.S. 581 (1889) 13

Chin Yow v. United States, 208 U.S. 8 (1908)..... 14

Chy Lung v. Freeman, 92 U.S. 275 (1875) 12

Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908) 19

Downes v. Bidwell, 182 U.S. 244 (1901)..... 19

Fiallo v. Bell, 430 U.S. 787 (1977)..... 18, 21

Fok Yung Yo v. United States, 185 U.S. 296 (1902)..... 13

Fong Yue Ting v. United States, 149 U.S. 698 (1893) 13

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 19, 24

Gegiow v. Uhl, 239 U.S. 3 (1915) 14

Gilbert v. Homar, 520 U.S. 924 (1997)..... 27

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 16

Graham v. Richardson, 403 U.S. 365 (1971) 16, 18, 24

In re Griffiths, 413 U.S. 717 (1973)..... 18

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 18

INS v. Chadha, 462 U.S. 919 (1983)..... 21

Jean v. Nelson, 472 U.S. 846 (1985)..... 9, 23

Kaplan v. Tod, 267 U.S. 228 (1925)..... 12, 24

TABLE OF AUTHORITIES – Continued

Page

Korematsu v. United States, 323 U.S. 214 (1944) 3

Kwock Jan Fat v. White, 253 U.S. 454 (1920) 14

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 17, 29

Landon v. Plasencia, 459 U.S. 21 (1982) 18, 21, 29

Mathews v. Diaz, 426 U.S. 67 (1976) 29

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

Morrissey v. Brewer, 408 U.S. 471 (1972) 16, 19, 24, 25

Nishimura Ekiu v. United States, 142 U.S. 651 (1892) 13

Plyler v. Doe, 457 U.S. 202 (1982) 18

Rafeedie v. I.N.S., 880 F.2d 506 (D.C. Cir. 1989) 28

Reid v. Covert, 354 U.S. 1 (1957) 20

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) 10, 23

Rosenberg v. Fleuti, 374 U.S. 449 (1963) 17

In re Ross, 140 U.S. 453 (1891) 11

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) 19

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) ..... *passim*

Sugarman v. Dougall, 413 U.S. 634 (1973) 18

Tang Tun v. Edsell, 223 U.S. 673 (1912) 14

Tod v. Waldman, 266 U.S. 113 (1924) 14

Trop v. Dulles, 356 U.S. 86 (1958) 9

Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001) 21

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) ..... *passim*

United States ex rel. Mezei v. Shaughnessy, 195 F.2d 964 (2d Cir. 1952) 6

United States ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958) 23, 26

United States v. Jung Ah Lung, 124 U.S. 621 (1888) 13

United States v. Salerno, 481 U.S. 739 (1987) 28

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 20

Vitek v. Jones, 445 U.S. 480 (1980) 19

Warren v. United States, 58 F. 559 (1st Cir. 1893) 11

Washington v. Harper, 494 U.S. 210 (1990) 19

Wolff v. McDonnell, 418 U.S. 539 (1974) 19

Yamataya v. Fisher, 189 U.S. 86 (1903) 13, 14

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 12, 23

Zadvydas v. Davis, 533 U.S. 678 (2001) ..... *passim*

FEDERAL STATUTES AND CONGRESSIONAL BILLS:

Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885 11

Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903 11

Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86 11

TABLE OF AUTHORITIES – Continued

Page

H.R. 4858, 83d Cong. (1953) 7

Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat.163, 188 (1952) 12

MISCELLANEOUS:

T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983) 9

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Kenneth C. Davis, *Administrative Law* § 237 (1951) 14

John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. Chi. L. Rev. 212 (1954) 8

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Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11 (1985) 9

TABLE OF AUTHORITIES – Continued

Page

Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (1987) 9, 20

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David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983) 9, 16

David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 Sup. Ct. Rev. 47 ..... 22, 26, 28, 29

Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992) 9, 14

Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) 9

Gerald L. Neuman, *Strangers to the Constitution* (1996) 9, 11, 20

Note, *Developments in the Law – Immigration and Nationality*, 66 Harv. L. Rev. 643 (1953) 14

Note, *The Supreme Court, 1952 Term*, 67 Harv. L. Rev. 96 (1953) 8

Ronald D. Rotunda & John E. Nowak, 2 *Treatise on Constitutional Law* § 17.4 (2d ed.1986) 9

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICI CURIAE*[1]

This case addresses the due process rights of aliens in the United States who have been detained indefinitely pending final removal, because the United States is unable to deport them. *Amici curiae* are 24 professors of constitutional law, immigration law, foreign relations law, American legal history and federal courts at law schools in the United States. *Amici* have expertise in the constitutional law of the United States relating to foreign relations, immigration, and due process, and many have written about the due process principles raised by this case.[2] The professional interest of *amici* is in ensuring that the Court is fully and accurately informed of the circumstances giving rise to the "entry fiction" that aliens in the United States are unprotected by the Due Process Clause in some narrow contexts, and the extent to which that doctrine has become fundamentally irreconcilable with this Court's constitutional jurisprudence. Specifically, *amici* urge the Court not to reaffirm the decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and urge the Court to hold that the removal power of the government, particularly when that power results in

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[1] Pursuant to Supreme Court Rule 37.6, *amici*, who are listed on the inside front cover, state that no counsel for any party authored this brief in whole or in part. The brief was written by counsel for *amici*, with the assistance of Marc Ellenbogen, Joanne Savage, Rebecca Smullin and Stephen Vladeck, students at the University of Texas School of Law and Yale Law School. No one other than counsel for *amici curiae* has made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief. Letters of consent are being filed with the brief.

[2] Counsel for *amici* Melford O. Cleveland served as a law clerk to Associate Justice Hugo L. Black during the 1952-53 Supreme Court term, when *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), was decided.

the indefinite detention of aliens with lengthy contacts with the United States, is meaningfully limited by the requirements of due process.

SUMMARY OF ARGUMENT

As in *Zadvydas,* the question before this Court is whether aliens who were paroled into the United States many years ago, who cannot be removed, and who have significantly greater affiliations with the national community than most deportees, "are to be condemned to an indefinite term of imprisonment within the United States." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). Relying on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the government maintains that because parolees are subject to the "entry fiction" that they have never entered the United States, they are entitled to no due process protection against indefinite and prolonged detention, notwithstanding *Zadvydas*. Appellee's Br. to 11th Cir. at 19-20; *id.* at 22.

In *Mezei*, this Court held that aliens "on the threshold of initial entry" stand "on a different footing" from aliens "who have once passed through our gates." *Mezei*, 345 U.S. at 212. Indeed, the Court concluded bluntly, "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). The Court accordingly ruled, during the height of the Cold War, that Mezei could be excluded from the United States and detained indefinitely on Ellis Island, based on secret national security grounds and without any opportunity for a hearing, because no other country was willing to take him.

Mezei was an atrocity in its day and should not be reaffirmed by this Court. The *Mezei* Court erred profoundly in three important ways. First, the Court refused

to credit Mezei's very real and longstanding ties to the United States community as a legal resident of 25 years, and instead "assimilated" him to the status of a first time applicant at the border. *Mezei*, 345 U.S. at 214. Second, in holding that due process for the alien seeking admission is whatever Congress says it is, the Court ignored the preceding half century of constitutional jurisprudence recognizing increasing due process protections in the exclusion context. And third, the Court concluded that Mezei's *de facto* detention as a result of the government's inability to deport him did not constitute a deprivation of liberty, but was simply an unfortunate byproduct of Mezei's excludability.[3]

Mezei was severely criticized in its day for all these failings, and its disharmony with U.S. constitutional principles has only increased as the subsequent decisions of this Court have further undermined the holding. This Court has never reaffirmed the government's ability to indefinitely detain inadmissible aliens who cannot be removed. The decision stands, like *Korematsu v. United States,* 323 U.S. 214 (1944), as an unwanted relic of its era.

Amici Law Professors write to submit that this Court should not repeat and compound the errors of *Mezei* by reaffirming that ruling to uphold the indefinite detention of the Mariel Cuban detainees, who have lived, worked, paid taxes, and built friendships, families, and communities in our nation for over twenty years. *Amici* instead

[3] *Amici* Law Professors write to urge the Court not to repeat the first two errors of *Mezei* in this case. As set forth more fully in the Brief of the American Bar Association *Amicus Curiae* in Support of Petitioner, the *Zadvydas* decision corrected the third error of *Mezei* by recognizing that an unremovable alien's continued detention could not escape due process scrutiny merely because the alien was no longer entitled to remain in the United States. *Zadvydas*, 533 U.S. at 695-96.

urge the Court to continue the important project it began with *Zadvydas* of remedying the longstanding incoherence in our constitutional due process jurisprudence that is created by the fiction that parolees physically present in the U.S. with the consent of the government, often for many years, acquire no liberty interests or due process rights whatsoever as a result of their lawful contact with our national community. The bright line distinction drawn in *Mezei* between aliens deemed to be at the border, who do not have due process protection, and those within the United States, who do, should be replaced with the nuanced balancing approach that this Court has applied to due process in other contexts. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Under the *Mathews* test, the due process rights of aliens would be determined by weighing the alien's legal status and the extent and nature of her ties to the national community. Aliens truly on the threshold of initial entry ordinarily would be entitled to the lowest due process protections, and the government could have a legitimate interest in detaining an alien for lengthy periods where specific, articulable national security concerns were involved or the alien otherwise posed a significant danger to the community. But rigorous procedural protections would have to be afforded in such circumstances, and no alien subject to U.S. authority would exist in a fictitious limbo outside the law.

ARGUMENT

I. *MEZEI* IMPROPERLY APPLIED THE ENTRY FICTION TO HOLD THAT AN ALIEN WITH SIGNIFICANT CONTACTS IN THE UNITED STATES POSSESSED NO DUE PROCESS RIGHTS

A. The *Mezei* Decision

The national security immigration cases decided in the early 1950's at the height of both the Korean War and the McCarthy era represent the "modern zenith" of the entry fiction and judicial deference to congressional decisions regarding immigration. Charles Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 954 (1995). In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court affirmed the exclusion, based on secret national security grounds and without a hearing, of the non-citizen wife of a U.S. soldier, holding that regardless of the rule applicable to persons "who have gained entry into the United States," the government's decision to exclude an alien presenting at the border was "final and conclusive." *Id.* at 543.[4]

Mezei was the most extreme example of the Court's McCarthy Era jurisprudence of withholding judicial scrutiny of even the most egregious violations of basic rights. Ignatz Mezei was a long-term lawful resident alien

[4] *Knauff* prompted substantial outcry in Congress and elsewhere. After numerous congressional hearings and condemnatory newspaper reports, the Attorney General reopened Ms. Knauff's case and she ultimately was ordered admitted to the United States. *See* Weisselberg, *supra*, at 958-64; *see also Mezei*, 345 U.S. at 225 (Jackson, J., dissenting) (describing *Knauff* as "a near miss, saved by further administrative and congressional hearings from perpetrating an injustice") (citation omitted).

who had come to the United States in 1923 and married an American citizen. During World War II, he had served in the U.S. Coast Guard, worked as an air raid warden, and sold war bonds. Brief for Respondent at 2, *Mezei* (No. 139). In 1948, Mezei attempted to travel to Romania to visit his dying mother and, after being denied permission to enter Romania, spent 19 months in Hungary attempting to return home to the U.S. *Mezei*, 345 U.S. at 208. He finally secured a visa and returned to the United States in 1950, where he was permanently excluded from re-entering for unspecified "security reasons." *Id.* The Government unsuccessfully attempted to deport Mezei to Hungary. France and Britain both denied him entry, as did many Latin American countries. *Id.* at 208-09.

Mezei petitioned for habeas corpus, and the district court granted the petition, finding that his then 21-month detention on Ellis Island was "excessive and justifiable only by affirmative proof of [Mezei's] danger to the public safety." *Id.* at 209 (citation omitted). The Second Circuit affirmed. *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952).

The Supreme Court upheld Mezei's indefinite detention without a hearing. Justice Clark found for the Court that "neither [Mezei's] harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding." 345 U.S. at 213. Justice Clark aggressively applied the entry fiction to hold that Mezei was "an entrant alien or 'assimilated to [that] status' for constitutional purposes." *Id.* at 214 (alteration in original) (citation omitted). He had no right to enter, and the government's refusal to parole him into the United States, even though it resulted in his *de facto* indefinite detention, deprived him of no constitutional right. *Id.* at 215.

Justices Black, Frankfurter, Jackson, and Douglas all dissented. Justice Black's dissent with Douglas condemned the Court for leaving Mezei's liberty "completely at the mercy of the unreviewable discretion of the Attorney

General." 345 U.S. at 217 (Black, J., dissenting). Justice Jackson's opinion, which Justice Frankfurter joined, bitterly protested the majority's application of *Knauff* in this context. "Because the respondent has no right of entry," Jackson wrote, "does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?" *Id.* at 226 (Jackson, J., dissenting). Just as "eject[ing] him bodily into the sea" would constitute a deprivation of life, Mezei's detention, "occurring within the United States or its territorial waters," constituted a deprivation of liberty which "may be done only by proceedings which meet the test of due process of law." *Id.* at 226-27. The majority's contention that Mezei was not detained in violation of his liberty "overwork[ed] legal fiction." *Id.* at 220.

B. The *Mezei* Decision Was Severely Criticized

Like the *Knauff* case before it, the *Mezei* decision provoked considerable public outcry. Editorials condemning the decision appeared in the New York Times and the Washington Post, and other newspapers around the country "excoriated the opinion."[5] Two private bills were introduced in Congress on Mezei's behalf.[6] Attorney General Brownell eventually agreed to grant Mezei a

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[5] Weisselberg, *supra*, at 970 n.201 (collecting newspaper reports). *See also Opening the Door*, N.Y. Times, Apr. 24, 1953, at 22 (describing the decision as "cruel, intolerant and downright un-American"); *Deprived of Liberty*, Wash. Post, Mar. 18, 1953, at 12 ("the indefensible consequences of the decision demand further attention").

[6] Senator Langer introduced a private bill for the relief of Ignatz Mezei on March 23, 1953. *See* S. 1414, 83d Cong. (1953). Representative Celler introduced a private bill on April 24, 1953. *See* H.R. 4858, 83d Cong. (1953).

hearing, and Mezei ultimately was paroled into the U.S.[7] In short, the process Mezei was finally afforded helped avert an egregious injustice.

The *Mezei* decision (and the *Knauff* case on which it relied) was heavily criticized in its day, both for failing to comport with the Court's existing due process jurisprudence, which recognized due process protections in exclusion proceedings, and for the Court's application of the fiction that an alien with lengthy ties to the United States possessed no greater due process protections than an initial entrant. In his famous dialogue on federal court jurisdiction, Professor Henry Hart criticized as "patently preposterous" the proposition that due process for aliens denied entry was whatever Congress had provided. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1392 (1953); *see also id.* at 1395 (The decision "trivialize[d] the great guarantees of due process" to reach "brutal conclusions") (footnote omitted).[8] The

[7] Weisselberg, *supra*, at 972. At the exclusion hearing, the government established that Mezei had pleaded guilty in 1935 for possessing a bag of stolen flour, for which Mezei had been fined $10, *id.* at 976 & n.232, and that he had played a minor role in the Communist Party twenty years earlier. *Id.* at 985.

[8] *See also* Hart, *supra*, at 1394 (condemning the *Knauff* decision for relying indiscriminately upon early harsh decisions denying due process to aliens in both admission and deportation cases, "without noticing that the principle which had compelled repudiation of the deportation precedents required repudiation also of the others"); Note, *The Supreme Court, 1952 Term,* 67 Harv. L. Rev. 96, 100 (1953) (criticizing *Knauff* for "resurrect[ing]" a doctrine seemingly "inconsistent with the extensions of the Due Process Clause to limit the plenary congressional power over aliens"); John P. Frank, *Fred Vinson and the Chief Justiceship,* 21 U. Chi. L. Rev. 212, 231-32 (1954) ("[Mezei] conveys the most brutal shock to the moral sense of any of the opinions in this tragedy-laden area. . . . "). For other contemporary critiques, *see* Weisselberg, *supra*, at 985 n.267 (collecting sources).

scholarly[9] and judicial[10] criticism of the decision has continued unabated.

[9] *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L. J. 365, 374 (2002) ("The rule affirmed in *Mezei* . . . is wildly out of step with modern constitutional law."); T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11, 27-34 (1985); Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 200-01 (1987); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 173, 176 (1983) (The Court "misread[ ] the cases it invoked and ignor[ed] many others" yielding a doctrine that was "scandalous . . . deserving to be distinguished, limited, or ignored."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1642 (1992) (The Court's developing due process jurisprudence for excludable aliens "turned colder" with the *Knauff* and *Mezei* decisions "at the height of McCarthyism and the nation's preoccupation with the perceived Communist threat."); Gerald L. Neuman, *Strangers to the Constitution*, 253 n.2 (1996); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 1052 (1998) ("The legal fiction that exclusion merely withholds a benefit was . . . stretched beyond decency in *Mezei*."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 20 (1984) ("[T]hese decisions [*Knauff* and *Mezei*] are easy to denounce and their reasoning is not difficult to demolish."); Peter H. Schuck, *Developments in the Law – Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1322-24 (1983) ("In advancing this language of absolute exclusion power, the Court deviated sharply from fifty years of doctrinal development"). *See also* Ronald D. Rotunda & John E. Nowak, 2 *Treatise on Constitutional Law* § 17.4 n.62 (2d ed.1986) ("The ability to detain unadmitted aliens for an indefinite period of time, and without procedural safeguards . . . seems difficult to rationalize in terms of modern conceptions of the fundamental fairness principle that lies at the heart of due process.").

[10] The decision has been excoriated in the courts. *E.g., Trop v. Dulles,* 356 U.S. 86, 102 n.36 (1958) (Warren, C.J.) (plurality opinion) (Mezei's extended confinement without judicial review was "intolerable"); *Jean v. Nelson*, 472 U.S. 846, 868-69 (1985) (Marshall, J.,

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II. *MEZEI'S* APPLICATION OF THE ENTRY FICTION HAS CREATED AN INTOLERABLE INCOHERENCE IN THIS COURT'S DUE PROCESS JURISPRUDENCE

By applying the entry fiction to create a bright line rule between the constitutional rights of aliens at the border and those who have entered the United States, *Mezei* ignored the preceding fifty years of this Court's jurisprudence, which recognized due process protections for aliens at the border, and which had not distinguished sharply between the rights of aliens in exclusion and deportation proceedings. It was *Mezei* that created a significant disharmony in the rights of these two groups, with the result that aliens who entered the United States (whether lawfully or clandestinely) and later were found to be removable were entitled to due process protection, while aliens presenting lawfully at the border and found to be inadmissible were not. This dissonance has only increased since *Mezei*, as the Court has upheld broader due process protections for aliens who have "entered" the United States and in other contexts. The Court's application of the Constitution abroad in some circumstances, and its recognition that Congress' "plenary" power over immigration is limited by the Constitution, have exacerbated the incongruence between the *Mezei* entry fiction and contemporary constitutional jurisprudence. The constitutional incoherence becomes particularly intolerable

dissenting) (The "broad dicta [of *Mezei*] can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence."); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1388 (10th Cir. 1981) (rejecting "euphemistic fiction" that detention of excludable aliens is merely a "continuation of the exclusion" without Fifth Amendment implications and describing *Mezei* as "the nadir of the law with which the opinion dealt").

when the entry fiction is applied to aliens paroled into the United States, who may live and work in the United States for years while nevertheless being deemed "nonpersons" for purposes of due process.

A. *Mezei* Ignored Prior Jurisprudence Recognizing Due Process Protections for Aliens at the Border

Before *Knauff* and *Mezei* the entry fiction did not have significant implications for the Constitution's application to aliens. Although the *Mezei* Court's assertion that aliens at the border are unprotected by due process appeared to be driven by late-nineteenth century theories that the Constitution was limited to U.S. territory,[11] the distinction between aliens who had landed, or "entered," the U.S. and those at the border originally was intended to protect shipping carriers from liability for allowing aliens to disembark unlawfully, *see Warren v. United States*, 58 F. 559 (1st Cir. 1893) (discussing carrier sanctions), and to establish that mere physical presence in the U.S. did not confer a right to remain under the immigration statutes.[12]

[11] *E.g.*, *In re Ross*, 140 U.S. 453, 464 (1891) ("The Constitution can have no operation in another country."); Gerald L. Neuman, *Strangers to the Constitution* 7-8 (1996) (discussing now-abandoned "strict territoriality" approaches to the Constitution).

[12] The entry fiction arose in the late nineteenth century, when it became impossible to conduct all immigration inspections before passengers disembarked from arriving vessels. Congress therefore authorized the "temporary removal" of aliens from vessels for purposes of inspection, but provided that such a transfer would not be deemed "a landing." *See* Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885; Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86 (each containing the same language regarding "removals" and "landings."). The Court later extended this

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Indeed, early cases had recognized that the Constitution applied to aliens at the threshold of entry. In *Chy Lung v. Freeman*, 92 U.S. 275 (1875), for example, the Court reversed the exclusion of an alien on a boat in San Francisco harbor on constitutional grounds. Although the Court ultimately relied on the Commerce Clause, *id.* at 280-81, the plaintiff also raised Fourteenth Amendment equal protection claims, Brief for Plaintiff in Error at 5-6, *Chy Lung*, 92 U.S. 275 (1875) (No. 478), and much of the Court's analysis credited her claim. *Chy Lung*, 92 U.S. at 278 (holding that it was "hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man" an arbitrary power). *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 108-109 (2002). Moreover, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), established that the Fourteenth Amendment's protections applied universally "to all persons within the territorial jurisdiction," *id.* at 369, without elaborating on this territorial limitation, and the Court cited the *Chy Lung* ruling regarding an alien in harbor in support of its equal protection analysis. *Id.* at 374. At any rate, both aliens on ships docked in U.S. harbors and those on U.S. soil were clearly within U.S. territory for the purposes of territorial jurisdiction.

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entry fiction to include parolees – aliens who are allowed to enter and remain in the United States with the government's permission, but who are denied admission and remain "in theory of law at the boundary line and [gain] no foothold in the United States." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (citation omitted). In 1952, Congress formally applied the entry fiction to nonimmigrant parolees by providing that parole "shall not be regarded as an admission" into the United States. *See* Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat.163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (2000)).

Subsequent cases also did not sharply distinguish between the procedural protections afforded aliens on either side of the "entry" line. The Court's late-nineteenth century decisions recognized broad congressional authority over both entry and deportation (or "expulsion"). *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding exclusion of alien at the border as a sovereign power); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (upholding deportation on the grounds that the powers to exclude or expel were "but parts of one and the same power"). But the Court recognized that even the exclusion power was limited by the Constitution, *Chae Chan Ping*, 130 U.S. at 604 (congressional authority is limited "by the constitution itself"), and scrutinized both exclusions and deportations for statutory compliance. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 663 (1892) (reviewing to determine whether exclusion is "in conformity with" law); *Fong Yue Ting*, 149 U.S. at 729-730 (reviewing legality of deportation decision on the merits).[13]

The Court gradually moved away from the plenary power decisions of the late 1800's to recognize greater procedural protections for both entry and deportation. In *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Court held that the removal of an unadmitted alien who had landed four days earlier was governed by "the fundamental principles that inhere in 'due process of law,'" including the right to a hearing regarding deprivations of liberty. *Id.* at 100-01. The Court observed that in construing "acts of

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[13] A number of decisions also rejected executive exclusion decisions for failure to comport with statutory requirements, *e.g., United States v. Jung Ah Lung*, 124 U.S. 621, 628-32 (1888) (implying authority from congressional statute to determine whether alien was properly excluded); *Fok Yung Yo v. United States*, 185 U.S. 296, 302 (1902) (courts will review decision to exclude non-citizen where "required by the Constitution . . . to intervene").

Congress, such interpretation ought to be adopted as . . . will bring them into harmony with the Constitution." *Id.* at 101.

The Court soon began expressly construing exclusion statutes to comport with basic due process. *Chin Yow v. United States,* 208 U.S. 8 (1908), upheld the finality of an exclusion decision "on the presupposition that the decision was after a hearing in good faith," *id.* at 12, and was understood as opening the door to "expanding judicial review" of exclusion hearings. *See* Kenneth C. Davis, *Administrative Law* § 237, at 828 (1951). Read together, *Yamataya* and *Chin Yow* led to greater due process protections in both the exclusion and deportation contexts.[14] In numerous other cases, the Court treated deportation and exclusion interchangeably. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1641 & n.76 (1992) (collecting cases).

It was *Knauff* and *Mezei* which purported to establish a bright line rule between aliens entitled to due process protection and those who were not. In stating that due process for aliens at the border was whatever Congress said it was and applying the entry fiction to a long term

[14] *See* Clement L. Bouvé, *A Treatise on the Law Governing the Exclusion and Deportation of Aliens in the United States* 138-41 (1912). *See also Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (executive's exclusion determination failed to comply with act of Congress and denied right to fair hearing); *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (granting relief because procedures cannot be "unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law"); *Tang Tun v. Edsell*, 223 U.S. 673, 681-82 (1912) (review of executive determination to ensure its authority was "fairly exercised"); *Tod v. Waldman*, 266 U.S. 113 (1924) (aliens detained pending entry hearing entitled to be released if hearing not held within definite period of time); Note, *Developments in the Law – Immigration and Nationality*, 66 Harv. L. Rev. 643, 671 (1953).

legal resident, the *Mezei* Court reversed the jurisprudential developments of the prior fifty years with respect to aliens seeking entry, while leaving those decisions in place for aliens "inside" the country.[15] As a result, even at the time, the decision established an unwarranted disharmony between the due process rights of aliens on one side or the other of the entry fiction line.

B. The *Mezei* Holding That Aliens at the Threshold of Entry Are Unprotected by Due Process Has Been Further Undermined by the Subsequent Decisions of this Court

This Court's jurisprudence in the half century since *Mezei* has exacerbated the decision's anomalous status in our constitutional system and has rendered untenable the proposition that aliens at the border have no due process rights. The post-*Mezei* Court has replaced the right/privilege distinction for determining constitutional rights and adopted the *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), balancing test under the Due Process Clause. The Court has recognized greater due process rights for aliens in the immigration context and elsewhere, and has significantly expanded the concept of liberty in other areas. The Court's retreat from its strictly territorial construction of the Constitution's scope has rendered an anachronism the fiction that aliens on U.S. soil who have not "entered" are unprotected by the Constitution. And the Court's recognition that Congress'

[15] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. at 1392, 1394. Hart criticized *Mezei* and *Knauff* for "ignor[ing] the painful forward steps of a whole half century of adjudication." *Id.* at 1396; *see also id.* at 1391 ("There arose up new justices in Washington which knew not Joseph. Citing only the harsh precepts of the very earliest decisions, they began to decide cases accordingly, as if nothing had happened in the years in between.").

power over immigration is subject to ordinary constitutional constraint has reined in the plenary power doctrine over immigration. All of these developments have rendered *Mezei* irreconcilable with contemporary constitutional jurisprudence.

i. Due Process Developments

The right/privilege distinction which governed the determination of constitutional rights when *Mezei* was decided has since been rejected by this Court in decisions applying due process protections to interests traditionally considered "privileges." *Compare Knauff*, 338 U.S. 537, 542 (1950) ("[A]n alien who seeks admission to this country" claims not a "right," but a "privilege," which is granted "only upon such terms as the United States shall prescribe."); *with Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (rejecting the right/privilege distinction for determining liberty interests implicated by revocation of criminal parole). *See also* Motomura, *supra*, at 1650-56 (discussing impact of abandoning right/privilege distinction on the *Mezei* doctrine). The Supreme Court has also adopted the flexible *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), balancing test for determining what process is due in a given context, as discussed further in Part III, below. Thus, although Mezei was viewed by the 1950s Court as seeking only the "privilege" of entry, his interests would be viewed and weighed through a very different lens under modern due process jurisprudence. *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 167 (1983) ("The Supreme Court's approach to due process has undergone a virtual revolution since [*Knauff* and *Mezei*].").

The Court has also eroded the entry fiction by recognizing due process protections for returning aliens like Mezei in some contexts. The tension began with the Court's decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), which was decided only a month prior to *Mezei*. The alien in that case was a legal resident who had left the United States for four months as a seaman, and like Mezei, was excluded at Ellis Island without a hearing. *Id.* at 592-95. While the Court "assimilated" Mezei to the status of a first time applicant lacking due process rights, however, Kwong Hai Chew's status was "assimilate[d] . . . to that of an alien continuously residing and physically present in the United States." *Id.* at 596. In short, the legal resident at the border in *Mezei* was deemed never to have entered the United States, while the legal resident in *Chew* was deemed never to have left. Even the *Chew* Court recognized that the constitutional rights of resident aliens should not turn on such fictions:

> While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. *His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.*

Id., at 601 (emphasis added). The Court accordingly construed the exclusion laws that it had applied in *Knauff* and *Mezei* as inapplicable to Chew.

In *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the Court held that a resident alien who had gone to Mexico for "about a couple hours," *id.* at 450, could not be subjected to exclusion proceedings at all. The Court read *Chew* as recognizing that returning resident aliens continued to be protected by the Fifth Amendment, *id.* at 460, and concluded that where a resident alien's trip abroad was

"innocent, casual, and brief," he would not be deemed to have made an "entry" upon his return. *Id.* at 461-62. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court again held that while a lawful permanent resident who had departed the U.S. for two days could be placed in exclusion proceedings upon her return, she remained entitled to the full panoply of constitutional due process protection that she would have possessed if she had never left. The recognition by the *Zadvydas* dissenters that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," *Zadvydas,* 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting), confirms this Court's recognition of due process rights for aliens at the border and the infirmity of the *Mezei* holding.

The Supreme Court also has expanded the constitutional protections owed aliens apart from the right to enter or stay in this country. *See, e.g., Plyler v. Doe,* 457 U.S. 202 (1982) (Fourteenth Amendment protects undocumented alien children from discrimination in public education); *Fiallo v. Bell,* 430 U.S. 787, 792 (1977) (congressional decisions regarding the classes of aliens that were eligible for admission were subject to constitutional scrutiny); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 102-03 (1976) (Due Process Clause protects aliens from discrimination in federal civil service employment); *Sugarman v. Dougall,* 413 U.S. 634 (1973) (Fourteenth Amendment protects aliens from discrimination in state civil service employment), *In re Griffiths*, 413 U.S. 717 (1973) (Fourteenth Amendment prohibits state from barring aliens from the practice of law); *Graham v. Richardson,* 403 U.S. 365, 376 (1971) (Fourteenth Amendment protects resident aliens against discrimination in state welfare benefits).

Finally, the Court has significantly expanded the protections afforded by the Due Process Clause outside the immigration context. For example, due process now limits the power of the government to impose incarceration or to worsen significantly the nature of the punishment imposed.

See, e.g., Vitek v. Jones, 445 U.S. 480, 488 (1980) (transfer to mental institution); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974) (loss of prison good-time credits); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (revocation of parole); *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (forced administration of psychotropic drugs). All of these developments render anachronistic the holding that an alien in *Mezei*'s shoes lacks due process protection.

ii. Understandings of the Constitution's Territorial Scope have Expanded Since *Mezei*

To the extent that *Mezei* relied upon the theory that the Constitution is limited to U.S. territory to deny due process protection to aliens "deemed" at the border, that doctrine also has since been abandoned, as the Court has adopted a flexible approach to the Constitution's application abroad. Even by 1953, the strict territoriality rationale had been significantly eroded. In the 1901 *Insular Cases*, the Supreme Court held that fundamental constitutional rights applied beyond U.S. shores to unincorporated U.S. possessions. *E.g., Downes v. Bidwell*, 182 U.S. 244, 287, 298 (1901) (White, J., concurring). In *Russian Volunteer Fleet v. United States,* 282 U.S. 481, 491-92 (1931), the Court recognized a Russian corporation located entirely abroad as an "alien friend[] embraced within the terms of the Fifth Amendment" for purposes of challenging a taking of property by the federal government. *See also Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908) (foreign corporation may sue under the Fourteenth Amendment to recover property stolen from abroad and brought to U.S.). Foreign corporations located entirely outside the United States are likewise entitled to due process protection, even where their only significant connection to the U.S. is being

sued in our courts. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

Only four years after *Mezei*, the Court in *Reid v. Covert*, 354 U.S. 1 (1957), recognized that the constitutional right to jury trial encompassed U.S. citizens abroad, and expressly overturned the theory that constitutional protections stopped at the water's edge. *See* Neuman, *Strangers to the Constitution* at 93-94. Even the decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held only that the Fourth Amendment did not apply to the seizure of an alien's property occurring entirely in another country, and Justice Kennedy's crucial fifth vote argued that the Constitution's reach abroad turned on whether such application in any given case was "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring). All of these holdings directly contradict the proposition that the Constitution as a territorial matter is somehow inapplicable to parolees living in the United States, or even to aliens on U.S. soil at the border.

iii. This Court has Cabined the Plenary Power Doctrine Since *Mezei*.

In the past fifty years, the Court has also reined in the plenary power doctrine in immigration which reached its zenith in *Mezei*, by holding that Congress' immigration power "is subject to important constitutional limitations." *Zadvyadas,* 533 U.S. at 695 (citation omitted).

The late-nineteenth century doctrine that immigration was largely immune from judicial oversight, see cases discussed *supra*, at 13, originally derived from a misreading of decisions which stood only for the proposition that immigration was a national, rather than state, power in our federal system. *See* Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 179-95 (1987). This misreading reflected the

nationalist and racist impulses of a peculiarly unattractive era. *See* Cleveland, *supra*, at 263-65 & n.1767.

Mezei and the other Cold War immigration decisions represented the apex of the Court's application of this doctrine. Since *Mezei*, however, the Court has progressively recognized that the immigration power is substantially subject to constitutional constraints. The Court has applied ordinary due process analysis in the immigration context, *e.g., Landon v. Plasencia*, 459 U.S. 21, 34 (applying the *Mathews v. Eldridge* balancing test). The decision in *INS v. Chadha,* 462 U.S. 919 (1983), importantly invalidated a legislative veto over an immigration statute, holding that Congress' authority over immigration must be implemented through "a constitutionally permissible means." *Id.* at 941-942. In *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), the Court acknowledged that there was some "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." And in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Court applied "conventional equal protection scrutiny" to a citizenship statute. *Id.* at 72-73.[16]

All of the Court's holdings expanding due process protections, affirming the Constitution's application to aliens at the border and abroad, and restricting the plenary power doctrine have exacerbated the *Mezei* doctrine's incoherence in our constitutional system.

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[16] *See also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Power*, 1984 Sup. Ct. Rev. 255, 261-77 (examining and refuting rationales for the plenary power doctrine). For further critiques of the plenary power doctrine, see sources collected *supra*, at note 8.

C. Application of the Entry Fiction to Parolees Present in the United States with Substantial Connections to the Community Creates an Intolerable Constitutional Incoherence

The application of the entry fiction to deny due process protections to parolees who have substantial lawful connections to this country has stretched the entry fiction to the breaking point. The error began with the *Mezei* Court's refusal to recognize that any liberty interests arose from Mezei's lengthy U.S. residence. As Professor Hart observed, after *Mezei*

> a Mexican . . . who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation. But . . . a duly admitted immigrant of twenty-five years' standing who has married an American wife and sired American children, who goes abroad as the law allows to visit a dying parent, and who then returns with passport and visa duly issued by an American consul, is entitled to nothing – and, indeed, may be detained on an island in New York harbor for the rest of his life if no other country can be found to take him.

Hart, *supra*, at 1395 (footnote omitted).

Parolees such as Benitez[17] have been released into the United States with the government's consent, but remain aliens on the threshold of entry in the eyes of the law for some limited purposes. *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 Sup. Ct. Rev. 47,

[17] Because Benitez proceeded *pro se* in the district court, the factual record regarding his circumstances is limited. Benitez was welcomed by the United States in 1980, has a U.S. citizen brother and sister-in-law in Florida, and has spent over thirteen years living and working freely in the U.S.

99-100. This practice has continued the rank fiction that, despite *Yick Wo's* promise that the Constitution protects all persons within the territorial jurisdiction, 118 U.S. at 369, parolees who have lived and moved within the United States with few restrictions remain "nonpersons" for purposes of the Due Process Clause. *See Jean v. Nelson*, 472 U.S. 846, 872 (1985) (Marshall, J., dissenting) ("The broad and ominous nature of the [*Mezei*] dicta . . . becomes clear when one realizes that they apply . . . to [paroled] aliens . . . who literally live within our midst, [but] . . . have no more rights than those in detention.").[18]

The absurdity of deeming parolees "outside" the United States for due process purposes was starkly illustrated in *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958). That case addressed some of the 30,000 Hungarian refugees who had been paroled into the United States following the failed 1956 Hungarian revolution. The court refused to apply the entry fiction to hold that refugees who had come to the U.S. to flee Communism could be excluded, and their families divided, based on arbitrary or capricious grounds. *Id.* at 613-14. The Court accordingly required a hearing prior to the revocation of parole in order to avoid constitutional doubt. *Id.* at 614-15.

Moreover, the situation of immigrant parolees stands in stark contrast to parole in the criminal context, where

[18] Indeed, the entry fiction has been applied to allow the detention of paroled Mariel Cubans with hardened criminals in maximum security federal penitentiaries for 10 years or more, even though the aliens are not serving any criminal sentence. *E.g., Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1443–(9th Cir. 1995) (en banc) (upholding indefinite detention of Mariel Cuban detained in maximum security federal penitentiaries at Lompoc and Leavenworth); *but see Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (declining to apply *Mezei* to determine due process rights of parolees detained in maximum security facilities).

this Court has rejected the theory that parole is a matter of legislative grace that creates no liberty interests.[19] In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court recognized that the traditional application of the right/privilege distinction, which had viewed parole as a privilege rather than a vested right, was no longer dispositive. *Id.* at 481 (citing *Graham v. Richardson*, 403 U.S. 365 (1971)). Even if incarcerated persons did not have a substantial interest in being granted parole, 408 U.S. at 482 n.8, the "conditional liberty" they enjoyed once released on parole, *id.* at 480 and the accompanying community ties their freedom fostered, established interests sufficient to trigger due process protection. *Id.* at 482. *See also Gagnon v. Scarpelli*, 411 U.S. 778, 782 & n.4 (1973) (rejecting the principle that "probation is an 'act of grace'" and holding that revocation of probation implicates liberty interests requiring the protection of due process). It is untenable to hold that a convicted criminal released on parole acquires some liberty interests implicating due process, but that a paroled refugee does not.

Accordingly, the Government's effort to treat the Mariel Cubans as "entrant alien[s] or 'assimilated to [that] status' for constitutional purposes," *Mezei*, 345 U.S. at 214 (alteration in the original) (citation omitted), is intolerable in light of both their treatment by the United States and the developments in due process and other constitutional

[19] Criminal parole, like parole in the immigration context, traditionally has been considered "a correctional device authorizing service of sentence outside the penitentiary," in which the parolee is still "in custody" as a legal matter. *Morrissey*, 408 U.S. at 474-75 (citation omitted). *See also Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (immigrant parolees' status has not changed simply because their "prison bounds were enlarged"); *Zadvydas*, 533 U.S. at 696 (choice for aliens who cannot be returned is not between imprisonment and release, but between "imprisonment and supervision under release conditions that may not be violated").

jurisprudence since *Mezei*. Even if this Court were to conclude that application of the entry fiction might be appropriate for initial applicants under some circumstances, *Mezei* should not be read to withhold due process protection from the Petitioner here, who is both a quasi-refugee, as in the *Murff* case, and a long time U.S. resident.

III. THE COURT SHOULD REMEDY THE CONSTITUTIONAL INCOHERENCE CREATED BY *MEZEI* AND SUBJECT IMMIGRATION DETENTION DECISIONS TO ORDINARY *MATHEWS V. ELDRIDGE* SCRUTINY

Amici Law Professors urge that the Court take a step toward redressing the entry fiction's anomalous and discordant relationship to modern due process jurisprudence by adopting a graduated approach to the due process rights of aliens in removal proceedings under the *Mathews v. Eldridge* balancing test. 424 U.S. 319, 334-35 (1976). Such a test would recognize that due process applies across the board to aliens in the immigration context, as elsewhere, and that the appropriate question is not *whether* due process applies, but what process is due under any given circumstance. *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. at 481 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.")) (alteration in original).

Mathews, of course, requires the Court to balance the private interest affected by governmental action, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

In the immigration removal context, the *Mathews* test would determine what process was due by weighing both the alien's legal status and the nature and scope of her affiliations with the national community, against the government's legitimate interests. *See* Martin, *Graduated Application of Constitutional Protections for Aliens,* 2001 Sup. Ct. Rev. at 92-101. For example, with respect to legal status, aliens who had been lawfully admitted into the United States and maintained their lawful resident status would be recognized as having greater interests at stake in the balancing test than unadmitted aliens who were physically in the country, parolees, or aliens presenting at the border for the first time. With respect to community affiliation, aliens such as Mezei or parolees like Benitez with lengthy ties to the United States – who had worked, lived, and raised families in our community – would be recognized as having more substantial interests at stake than aliens who truly presented at the border for the first time. *See United States ex rel. Paktorovics v. Murff*, 260 F.2d at 613-14. But even aliens seeking initial entry would have some due process protection. T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L. J. 365, 375 (2002) (urging Court to reorient its constitutional analysis to hold that "due process applied in general to immigration proceedings (including to initial entrants at the border) and that the process that was due would depend on location, status, and other factors").

This approach would remedy the *Mezei* Court's errors. It would relieve the Court from drawing a fictitious and anachronistic line between whether the Constitution applies or does not apply to aliens in a given context. It would allow for accurate recognition of aliens' meaningful ties to the national community, through a flexible test for determining what process is due. Doing away with the fictitious divide between those who possess any constitutional rights and those who possess none also would be

consistent with the fact that physical abuse, torture, and civil detention of aliens by the government implicates liberty interests under the Due Process Clause, as the dissenters recognized in *Zadvydas*. *See* 533 U.S. at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"); *id.* at 704 (Scalia, J., dissenting). The relevant question no longer would be whether treatment of an alien at the border implicates any constitutional rights, but what process is due in any particular circumstance.

To say that aliens are entitled to due process protection under the *Mathews* test, moreover, does not deny the weighty governmental interests at stake. The *Mathews* test traditionally has given deference to the government's unique interest in avoiding burdensome procedures. *Gilbert v. Homar*, 520 U.S. 924, 932-33 (1997); *Mathews*, 424 U.S. at 333-34. The government's interests in controlling this country's borders, enforcing our immigration laws, preserving the safety of the community, and other important governmental concerns likewise would be entitled to substantial weight. Thus, for aliens truly presenting at the border for the first time, the government's interests in controlling entry into the United States and in efficient administration, and the alien's less substantial interest in entering, would typically weigh in favor of limited procedural protections.

On the other hand, the interests of a paroled quasi-refugee such as Benitez, with lengthy ties to the national community, who was facing indefinite detention because he could not be removed, would weigh heavily and preclude detention in most circumstances, since the government's interest in effectuating its removal policy under these circumstances is "weak or nonexistent." *Zadvydas*, 533 U.S. at 690. In addition to the liberty interests implicated by the alien's lengthy affiliation with the United States, the alien's detention would trench on the most fundamental of liberty interests. *See id.* ("Freedom from

imprisonment . . . lies at the heart of the liberty that [the Due Process Clause] protects."); Martin, *Graduated Application of Constitutional Protections for Aliens,* 2001 Sup. Ct. Rev. at 124.

This is not to say, however, that lengthy detention in the removal context would never be available. Specific, articulable national security concerns or a high threat of dangerousness to the community would constitute significant governmental interests that could warrant substantial deprivations of liberty. *See Zadvydas,* 533 U.S. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention."). The balancing test would have to be weighed heavily against preventative detention, however, and afford rigorous procedural protections. *See Zadvydas*, 533 U.S. at 691 (discussing strict procedural safeguards required for pretrial and preventive detention); *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (pretrial detention); *see also* Aleinikoff, *Detaining Plenary Power*, 16 Geo. Immigr. L. J. at 388 (arguing that lengthy detention of an alien subject to a final removal order must be based on specific and stringent protections for the detainee, with a high burden on the government for proving dangerousness (such as "clear and convincing" evidence), and a full opportunity to confront witnesses and have counsel, an independent adjudicator and judicial review). Since *Mezei*, the courts have developed procedural mechanisms for considering national security concerns of the type posed in that case. *See Rafeedie v. I.N.S.*, 880 F.2d 506, 523 (D.C. Cir. 1989) (applying *Mathews* test to deportation of returning resident alien denied entry on national security grounds). *See also* Brief of the American Bar Association *Amicus Curiae* in Support of Petitioner, Part III (discussing national security issues in *Mezei*). No specific articulable national security concerns, however, have been remotely implicated here.

In short, application of the ordinary due process balancing test to immigrant detainees would not deny the government power to control entry, or "to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." *Zadvydas*, 533 U.S. at 695. It would leave no "'unprotected spot in the Nation's armor.'" *Id.* at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. at 602).

Application of the *Mathews* balancing test is consistent with the progression of this Court's due process jurisprudence regarding aliens for many years. *See Landon v. Plasencia*, 459 U.S. at 34 (applying *Mathews* balancing test to determine due process rights of returning resident alien in exclusion proceedings, and weighing alien's interests at stake, including former presence in the United States, family ties and connections to the community, as well as government's interest in efficient procedures); *Mathews v. Diaz,* 426 U.S. 67, 78 (1976) (due process protection for aliens does not require "that all aliens must be placed in a single homogeneous legal classification"). As this Court noted in *Zadvydas*, "the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon *status and circumstance*." 533 U.S. at 693-94 (citations omitted) (emphasis added). *Benitez* offers the Court the opportunity to continue its forward steps in these cases by adopting a sensible framework yielding graduated constitutional protections for different categories of aliens, which considers "how the incidents of their status, coupled with the social reality they have experienced and the community ties they enjoy, affect the constitutional calculus." Martin, *Graduated Application of Constitutional Protections for Aliens,* 2001 Sup. Ct. Rev. at 137.

CONCLUSION

For the foregoing reasons, this Court should grant relief to petitioner.

Respectfully submitted,

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